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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

COMPANIES (ACQUISITION OF SHARES) AMENDMENT BILL 1980

EXPLANATORY MEMORANDUM

(Circulated by The Hon. R.V. Garland M.P., Minister for
Business and Consumer Affairs)

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INTRODUCTION

1. This explanatory memorandum contains a brief outline of the co-operative companies and securities scheme and the Companies (Acquisition of Shares) Act 1980 (hereafter referred to as 'the Share Acquisition Act' or 'the Principal Act') and then deals sequentially with each clause of the Companies (Acquisition of Shares) Amendment Bill 1980 (hereafter referred to as 'the Amendment Bill').

Formal Agreement

2. On 22 December 1978 the Commonwealth and the six States executed a Formal Agreement that provides the framework for a co-operative Commonwealth/State scheme for a uniform system of law and administration in relation to company law and the regulation of the securities industry in the six States and the Australian Capital Territory. The Formal Agreement also provides a procedure to enable the Northern Territory to become a party to the Agreement (Agreement cl. 49) and to enable the Agreement to be extended to the various external Territories (Agreement cl. 50).

National Companies and Securities Scheme Legislation

3. Following execution of the Formal Agreement the Commonwealth Parliament passed the following Acts:

- (a) National Companies and Securities Commission Act 1979;
- (b) Companies (Acquisition of Shares)Act 1980;
- (c) Companies (Acquisition of Shares-Fees) Act 1980;
- (d) Securities Industry Act 1980;
- (e) Securities Industry (Fees) Act 1980; and
- (f) Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980.

4. A brief outline of the NCSC Act and the co-operative scheme is as follows:-

- (a) The NCSC Act established the National Companies and Securities Commission (the 'NCSC') which will have responsibility for the companies and securities laws covered by the Formal Agreement subject to directions from the Ministerial Council for Companies and Securities which is established by the Agreement. The NCSC will have such functions and powers as are conferred on it by the various pieces of Commonwealth, State and Territory legislation that are required to give effect to the co-operative

companies and securities scheme. The administration of the co-operative scheme legislation within each State and Territory will, so far as is practicable, be carried out by the relevant corporate affairs office in that State or Territory under delegations from the NCSC.

- (b) The content of the substantive laws under the scheme will be set out in legislation that will apply to the Australian Capital Territory. Each other jurisdiction that is covered by the Formal Agreement will then pass legislation which will apply the relevant Commonwealth law as the law of that jurisdiction to the exclusion of its present legislation as from the date of commencement of the Commonwealth law. Subsequently, any amendments to the Commonwealth law that are approved by the Ministerial Council will have automatic effect in those jurisdictions subject to the making of any necessary "translator" amendments, without the necessity of further and separate substantive legislation in each other jurisdiction.

(c) The aim is that, as far as possible, any person or company in a particular Australian jurisdiction should be able to deal on all general companies and securities matters as if that person or company were only subject to one system of law and administration throughout Australia.

5. Each State will be introducing a National Companies and Securities Commission (State Provisions) Bill into its Parliament to support the functions of the NCSC in that State. Once these Bills are brought into operation, the NCSC will be in a position to start administering the substantive legislation : it is expected that this will be the Share Acquisition Code and the Securities Industry Code. These will be followed by the Companies Code.

New Australian code on the acquisition of company shares

6. The Share Acquisition Act sets out the substantive provisions of the code on the acquisition of company shares and applies these provisions in the A.C.T. The substantive provisions of the code are in an appropriate form for any State or Territory that is covered by the co-operative scheme to apply them in that jurisdiction by appropriate legislation.

7. The code will be administered by the NCSC which, so far as is practicable, will delegate its administrative responsibilities to the relevant corporate affairs office in each jurisdiction.

8. Basically, the proposed new share acquisition code will prohibit (unless exempted) acquisitions above 20% and below 90% of a company's shares unless one of the following methods is adopted:

- (a) a gradual acquisition of shares in any way the acquirer chooses at the rate of 3% every six months;
- (b) by a formal take-over bid, based on the procedure that existed under the superseded take-over legislation; or
- (c) a take-over announcement on the floor of the home exchange of the offeree company, undertaking unconditionally to take, for a period of one month and at a specified price, all shares offered.

COMPANIES (ACQUISITION OF SHARES) AMENDMENT BILL 1980

Cl. 1 : short title, &c.

9. When enacted the Bill will be cited as the Companies (Acquisition of Shares) Amendment Act 1980, (Bill cl.1)

Cl. 2 : commencement

10. The provisions of the Bill will come into effect when the Principal Act comes into operation (Bill cl.2)

Cl. 3: restriction on acquisition of shares

11. Sub-section 11(6) of the Principal Act provides that the provisions of the A.C.T. Companies Ordinance relating to schemes of arrangement (sub-sections 181, 183 and 185) have effect subject to the take-overs provisions. This was done to overcome the danger that if the take-over provisions were tightened up, companies seeking to effect take-overs would attempt to do so under the guise of schemes of arrangement or reconstructions. Sub-section 11(6) of the Principal Act will now be omitted (Bill cl.3).

12. The effect of the proposed amendment will be that s-secs. 181, 183 and 185 of the Companies Ordinance will no longer have effect subject to the general restrictions on the acquisition of shares in sec. 11 of the Principal Act. However, certain

modifications have been made to provisions in the proposed Companies Bill corresponding to s-secs. 181, 183 and 185 of the Companies Ordinance to ensure that the provisions of the Principal Act are not avoided. For example, the Court will not be able to approve a compromise or arrangement unless it is satisfied that the compromise or arrangement is not proposed for the purpose of enabling any person to avoid the operation of the Principal Act (Companies Bill s-cls. 315(20); 317(4)).

Cl. 4: acquisitions to which section 11 does not apply

13. Section 12 of the Principal Act sets out a number of acquisitions to which the share acquisition code does not apply.

14. Consequential on the amendment to sec. 11 of the Principal Act, it will now be provided that the share acquisition code will not apply to share acquisitions pursuant to a compromise or arrangement approved by the Supreme Court under Part VII of the A.C.T. Companies Ordinance (Bill cl.4).

Cl. 5: pari passu allotments

15. The restrictions on acquisition in the proposed code do not apply to an acquisition by a shareholder pursuant to a pari passu allotment of shares or by an underwriter or sub-underwriter of the allotment (Principal Act s-sec. 14(1)) provided that the allotment is to all persons registered as the holders of shares

in proportion to their shareholding (Principal Act s-sec.

14(2)). Where there are foreign share-holders, a company is deemed to comply with the provisions of s-sec. 14(2) if, instead of making offers to the foreign shareholders, it allots the foreigners' entitlement to a nominee for sale on approved terms, and then pays the proceeds of the sale to the foreign shareholders (Principal Act s-sec. 14(3)).

16. The effect of the amendment is that the nominee of a listed public company may now only be approved by its home exchange and not also by the NCSC (Bill cl.5).

Cl. 6 : take-over offers

17. It will be made clear that it is not necessary for an offeror holding shares in a target company to dispatch an offer under his take-over scheme to himself (Bill cl.6).

Cl. 7: take-over announcements

18. One form of acquisition that will be permitted under the proposed new code is a take-over conducted by means of an on-market announcement (Principal Act sec. 17). In such a case the shares must be acquired as a result of the acceptance of take-over offers made by the on-market announcement and in compliance with the other relevant requirements of sec. 17 (Principal Act s-sec. 17(1)).

19. The Principal Act will now be amended to provide that, in addition, such an acquisition of shares must not take place pursuant to a transaction that is a "crossing" within the meaning of the business rules or listing rules of the home stock exchange (Bill cl.7).

20. The practical effect of this amendment is to extend the current prohibitions on crossings (Principal Act para 8(9)(a) and s-secs. 13(3) and 40(3)) to the broker acting for an on-market offeror pursuant to that offeror's on-market announcement.

Cl.8 : Part B statement

21. Under s-sec. 22(4) of the Principal Act, a target company is required to lodge a copy of its Part B statement, together with any accompanying report or statement, with the NCSC, and if the target is a listed company then the material must also be copied to its home stock exchange.

22. In addition to these existing requirements, where a report by an expert accompanies the Part B statement, the target company will also be required to lodge with the NCSC a notice signed by the expert, stating that the expert consents to his report accompanying the Part B statement (Bill cl.8).

Cl. 9: offeror connected with target company

23. Where an offeror holds 30% or more of the shares in the target company, or the offeror and target company have common directors, the Part B statement must be accompanied by a report by an independent expert (Principal Act sec. 23).

24. Where such a report contains a statement concerning profit forecasts or asset valuations then the report will not be able to be used for the purposes of compliance with sec. 23 and may not accompany a Part B statement unless the NCSC gives its consent in writing (Bill cl.9 proposed s-sec. 23(2A)).

Cl.10: substitution of section -

27. Variation of take-over offers

25. Except for the variation of the date by which consideration must be paid, an offer under a take-over scheme can only be varied, and the offer period can only be extended, in accordance with sec. 27 of the Principal Act. Under this section, an offeror may not vary the terms of a take-over offer, or extend the period for which the take-over offer remains open, unless:

(a) the variation or extension is permitted by the regulations; or

(b) the NCSC consents in writing to the variation or extension, which may be subject to conditions

(Principal Act s-sec. 27(1)).

26. This section will be replaced by new provisions relating to the variation of offers (Bill cl. 10). The details of these new provisions are set in paragraphs 27 to 30.

27. An offeror may not vary a take-over offer without the consent of the NCSC unless the variation is permitted under this section or by the regulations (Proposed new s-sec. 27(1)). The NCSC may consent to the variation either unconditionally or subject to conditions (Proposed new s-sec. 27(2)). Where an offeror varies a take-over offer he must make a corresponding variation to all unaccepted offers (Proposed new s-sec. 27(3)).

28. The following types of variations will be permitted:

(a) certain specified increases in the consideration (Proposed new s-sec. 27(4)) : amongst other things, an offer involving a share consideration can be varied by specifying a cash sum in addition (Proposed new para 27(4)(b)) : earlier acceptors will be entitled to receive the increased consideration (Proposed new s-sec. 27(5)).

(b) the inclusion of a cash sum as an alternative where the consideration formerly consisted only of securities (Proposed new s-sec. 27(6)) : earlier acceptors will have the option of taking the cash alternative (Proposed new s-sec. 27(7)).

(c) extension of the offer period for up to 12 months

(Proposed new s-secs. 27(8) and (9) - see also Principal Act s-para.16(2)(f)(ii) which provides for a basic period of up to 6 months); this extension will only be effective if an appropriate notice is sent to the target company with copies to each other offeree (plus copies to the home exchange of a listed target company). (See proposed new s-sec. 27(11)).

29. The procedures in relation to variations will be as follows:

(a) Variations of associated offers must be by written notice to the target company (with copies to each other offeree) setting out the terms of the variation and particulars of necessary modifications to the relevant Part A statement

(Proposed new s-sec. 27(10)).

(b) An attempt to extend an offer beyond 6 months will be ineffective unless the required notice is sent to the target company with copies to each other offeree (plus copies to the home exchange of a listed target company) during the sixth month (Proposed new s-sec. 27(11)). Amongst other things, the notice must inform the offeree of his right to withdraw if he has already accepted the offer and where an offeree does withdraw his acceptance of an offer, the offeror must return his scrip to him within 14 days (Proposed new s-sec. 27(12)).

(c) A copy of certain notices of variation must be registered with the NCSC before dispatch (Proposed new s-sec. 27(13)). The NCSC will have the same powers to refuse registration as it has in relation to Part A statements (Proposed new s-sec. 27(14) - see Principal Act s-sec. 18(2) dealing with Part A statement). Registrable notices must include a disclaimer of responsibility by the NCSC for the contents of the notice (Proposed new s-sec. 27(15)).

30. An acquisition of shares pursuant to a take-over offer will not be invalid where the offeror has purported to vary the take-over offer but has contravened or failed to comply with:

- (a) a requirement of sec. 27;
- (b) a requirement of the regulations; or
- (c) a condition imposed by the NCSC.

(Proposed new s-sec. 27(16)).

Cl.11: forecasts of profits

31. The prohibition on forecasts of profits by bidders and target companies contained in sec.37 of the Principal Act will not now apply to forecasts:

- (a) issued with the consent of the NCSC and in accordance with any conditions imposed by it (the present paras 37(3)(a) and (b) ; or

- (b) contained in a report accompanying a Part B statement with the consent of the NCSC given under s-sec 23(2A) and in accordance with any conditions imposed by the NCSC. (See paras 23 and 24 of this explanatory memorandum).

(Bill cl.11).

Cl. 12: statements on asset valuations

32. The prohibition on statements concerning asset valuations by directors of target companies contained in sec. 38 of the Principal Act will not now apply to statements:

- (a) in writing and issued with the consent of the NCSC and in accordance with any conditions imposed by it (the present paras. 38(2)(a) and (b); or
- (b) contained in a report accompanying a Part B statement with the consent of the NCSC given under s-sec. 23(2A) and in accordance with any conditions imposed by the NCSC (the paras. 23 and 24 of this explanatory memorandum)

(Bill para. 12(a)).

33. Sub-paragraph 38(4)(b)(ii) of the Principal Act refers to accounts made out and lodged "in accordance with a provision of a law of another State or Territory." This reference will be corrected to read "in accordance with a provision of a law of a State or another Territory." (Bill para. 12(b)).

Cl.13 : provisions relating to dissenting shareholders

34. S-sec. 42(17) of the Principal Act refers to the transfer of marketable securities of a company "under the law of a State or of another Territory that corresponds with this section". This reference will be corrected so that it reads "under the provision of the law of a State or of another Territory that corresponds with this section" (Bill cl.13).

Cl. 14 : court may excuse contravention or non-compliance due to inadvertence, &c.

35. The Supreme Court will be given an additional power to direct that offers are to be deemed to have been varied in accordance with the requirements of the proposed code where:

- a) an offeror purports to vary an offer under a take-over scheme in accordance with sec. 27 or the regulations;

b) a requirement of sec. 27 or the regulations has not been met; and

c) the Court is satisfied that the non-compliance is due to inadvertence, mistake or circumstances beyond the offeror's control and that the non-compliance ought to be disregarded

(Bill cl. 14 - proposed new s-sec. 48(3A)).

Cl.15: new section-

49A. Reduction of capital or cancellation of allotment

36. Sec. 64 of the A.C.T. Companies Ordinance and the Companies Acts of each State allows a company, if authorized by its articles (and subject to confirmation by the Court) to reduce its share capital in any way by special resolution.

37. The requirements of sec. 64 not will now apply in relation to a reduction of capital or to a cancellation of allotted shares resulting from the operation of the Principal Act and does not invalidate any such reduction or cancellation of shares (Bill cl.15 - proposed new sec. 49A). Such a reduction or cancellation could arise in connection with the withdrawal of offers under sec .21 of the Principal Act and the variation of offers under proposed new sec. 27.

Cl. 16 : continuing offences

38. The reference to offences in s-sec. 54(3) of the Principal Act will be made more specific (Bill cl.16).

Cl.17 : power of NCSC to declare acquisition of shares or other conduct to be unacceptable

39. Under sec. 60 of the Principal Act, the NCSC is empowered to declare that, for the purposes of that Act, a specified acquisition is an unacceptable acquisition and that specified conduct (once a Part A statement has been served, or a take-over announcement has been made) is unacceptable conduct. Before the NCSC makes a declaration under this section it must be satisfied of certain matters set out in s-sec. 60(7).

40. The precise matters as to which the NCSC must be satisfied in be a particular case will be clarified by providing seperate criteria for unacceptable acquisitions and for unacceptable conduct (Bill cl. 17). The proposed amendment will effect a drafting change only. The matters about which the NCSC must be satisfied pursuant to s-sec. 60(7) which now applies only to unacceptable acquisitions, are identical to those set out in proposed s-sec. 69(7A), which applies to unacceptable conduct.

Cl. 18 : schedule

41. Under the Principal Act, a formal offeror is required to serve on the target company a Part A statement which must set out detailed information in relation to the offeror. Similarly, an on-market offeror (who makes a take-over announcement to the home exchange of the target company) must serve on the target a Part C statement which sets out similar information in relation to the on-market offeror.

42. The proposed amendment will require a formal offeror to state in its Part A statement and an on-market offeror to state in its Part C statement the intentions of the offeror regarding:

- (a) the continuation of the business of the target company;
- (b) major changes to be made to that business, including any redeployment of the company's fixed assets; and
- (c) the future employment of the company's present employees

(Bill cl. 18)

43. Similar requirements are contained in Rule 15 of the London City Code on Take-overs and Mergers and in sec. 13(d)(1)(C) of the Securities Exchange Act of 1934 (of the United States of America).